

01
02
03
04
05 UNITED STATES DISTRICT COURT
06 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

07 VIRGINIA P. FERGUSON,)
08 Plaintiff,) CASE NO. C12-0470-RSL-MAT
09 v.)
10 MICHAEL J. ASTRUE, Commissioner) REPORT AND RECOMMENDATION
of Social Security,) RE: SOCIAL SECURITY DISABILITY
11 Defendant.) APPEAL
12 _____)

13 Plaintiff Virginia P. Ferguson proceeds through counsel in her appeal of a final decision
14 of the Commissioner of the Social Security Administration (Commissioner). The
15 Commissioner denied plaintiff's application for Supplemental Security Income (SSI) after a
16 hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision,
17 the administrative record (AR), and all memoranda of record, the Court recommends that this
18 matter be REVERSED and REMANDED for further proceedings.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1961.¹ She has a ninth grade education and previously

21 _____
22 ¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of
Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case

01 worked as a receptionist and production worker.

02 Plaintiff filed an application for SSI on August 28, 2008, alleging disability beginning
03 August 1, 2007. (AR 16.) Plaintiff's application was denied at the initial level and on
04 reconsideration. Plaintiff timely requested a hearing.

05 On November 15, 2010, ALJ Verrell Dethloff held a hearing, taking testimony from
06 plaintiff. (AR 43-60.) In a December 2, 2010 decision, the ALJ found a basis for reopening
07 plaintiff's prior SSI application, but concluded plaintiff was not disabled. (AR 16-37.)

08 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review
09 on January 13, 2012 (AR 1-5), making the ALJ's decision the final decision of the
10 Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

11 JURISDICTION

12 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

13 DISCUSSION

14 The Commissioner follows a five-step sequential evaluation process for determining
15 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it
16 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had
17 not engaged in substantial gainful activity since February 1, 2008, the application date of her
18 prior SSI application. At step two, it must be determined whether a claimant suffers from a
19 severe impairment. The ALJ found plaintiff's osteoarthritis and degenerative changes of the
20 spine; mild fibromyalgia; obesity; attention deficit hyperactivity disorder (ADHA) and learning
21 disorder severe. Step three asks whether a claimant's impairments meet or equal a listed

22 Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 impairment. The ALJ found that plaintiff's impairments did not meet or equal the criteria of a
02 listed impairment.

03 If a claimant's impairments do not meet or equal a listing, the Commissioner must
04 assess residual functional capacity (RFC) and determine at step four whether the claimant has
05 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to
06 perform light work as defined in 20 C.F.R. § 416.967(b), and to carry out simple repetitive tasks
07 without limitation, and detailed tasks that are "hands-on." With that assessment, the ALJ
08 found plaintiff able to perform her past relevant work as a receptionist and production worker.

09 If a claimant demonstrates an inability to perform past relevant work, the burden shifts
10 to the Commissioner to demonstrate at step five that the claimant retains the capacity to make
11 an adjustment to work that exists in significant levels in the national economy. Finding
12 plaintiff not disabled at step four, the ALJ did not proceed to step five.

13 This Court's review of the ALJ's decision is limited to whether the decision is in
14 accordance with the law and the findings supported by substantial evidence in the record as a
15 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
16 more than a scintilla, but less than a preponderance; it means such relevant evidence as a
17 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881
18 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which
19 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
20 F.3d 947, 954 (9th Cir. 2002).

21 Plaintiff argues that the ALJ failed to properly evaluate her fibromyalgia at step two,
22 erroneously evaluated the opinions of treating physicians and examining psychologists, failed

01 to properly evaluate her credibility, improperly determined her RFC, and erred in finding her
02 able to perform her past relevant work. Plaintiff argues that new evidence supports a remand
03 for a new hearing. The Commissioner argues that the ALJ's decision is supported by
04 substantial evidence and should be affirmed.

05 Medical Opinion Evidence

06 Plaintiff argues the ALJ failed to properly evaluate the opinions of treating doctors
07 Holly J. Christoferson, M.D. and John Yuen, M.D., and examining psychologists Paul D.
08 Connor, Ph.D. and Robert E. Parker, Ph.D.

09 In general, more weight should be given to the opinion of a treating physician than to a
10 non-treating physician, and more weight to the opinion of an examining physician than to a
11 non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not
12 contradicted by another physician, a treating or examining physician's opinion may be rejected
13 only for "clear and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391,
14 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may
15 not be rejected without "specific and legitimate reasons" supported by substantial evidence in
16 the record for so doing." *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.
17 1983)). The ALJ may reject physicians' opinions "by setting out a detailed and thorough
18 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
19 making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*,
20 881 F.2d at 751). Rather than merely stating her conclusions, the ALJ "must set forth [her]
21 own interpretations and explain why they, rather than the doctors', are correct." *Id.* (citing
22 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

01 “The ALJ is responsible for resolving conflicts in the medical record.” *Carmickle v.*
02 *Comm’r of SSA*, 533 F.3d 1155, 1164 (9th Cir. 2008) (citing *Benton v. Barnhart*, 331 F.3d
03 1030, 1040 (9th Cir. 2003). *Accord Thomas*, 278 F.3d at 956-57 (“When there is conflicting
04 medical evidence, the Secretary must determine credibility and resolve the conflict.”) (quoting
05 *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992)). While the ALJ need not discuss
06 each piece of evidence in the record, he must explain why “significant probative evidence has
07 been rejected.” *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (quoting *Cotter v.*
08 *Harris*, 642 F.2d 700, 706 (3d Cir. 1981)).

09 A. Holly J. Christoferson, M.D.

10 In large part, plaintiff’s assignment of error with regard to Dr. Christoferson consists of
11 no more than a recitation of that doctor’s opinions. (Dkt. 14 at 4-8.) However, plaintiff does
12 correctly point out that the ALJ failed to discuss the physical evaluation form completed by Dr.
13 Christoferson on April 24, 2009, stating the doctor’s opinion that plaintiff could not perform
14 even sedentary work. (AR 365.)

15 The Commissioner argues the ALJ’s reference to “several and various” opinions
16 regarding plaintiff’s capacities was sufficient to allow this Court to draw inferences as to why
17 the ALJ rejected this more restrictive opinion. Under different circumstances, the Court might
18 find the Commissioner’s suggestion persuasive. “As a reviewing court, we are not deprived of
19 our faculties for drawing specific and legitimate inferences from the ALJ’s opinion.”
20 *Magallanes*, 881 F.2d at 755. However, the inferences must be there to be drawn.

21 Here, the ALJ made reference to a number of Dr. Christoferson’s findings and
22 diagnoses, including persistent, chronic back pain, and concluded at step two that plaintiff’s

01 osteoarthritis and degenerative changes of the spine were severe. (AR 19, 30.) The ALJ
02 noted that Dr. Christoferson diagnosed chronic pain in the joint “at multiple sites”, stating that
03 plaintiff was at risk for fasciitis and progressive loss of ability to maintain exercise regimen,
04 and referring her to a podiatrist. (AR 29.) However, while the ALJ provided extensive
05 discussion of Dr. Yuen’s assessment of plaintiff’s functional capacity, finding it “fatuous,
06 accommodating, and grossly exaggerated” (AR 32), the ALJ did not discuss Dr.
07 Christopherson’s assessment in this regard. In fact, other than noting the doctor’s findings, the
08 ALJ provided no evaluation—positive or negative—of Dr. Christopherson’s treatment or
09 recommendations. Absent this, the Court is hard pressed to draw an inference from the rest of
10 the decision that could legitimately substitute for the ALJ’s own evaluation of Dr.
11 Christopherson’s functional capacity evaluation.

12 The ALJ is not required to adopt the opinion of any particular medical source, but is
13 obligated to “set forth his own interpretations and explain why they, rather than the doctors’, are
14 correct.” *Reddick*, 157 F.3d at 725. The Court finds it necessary to remand the matter to
15 allow the ALJ to evaluate Dr. Christoferson’s opinions about plaintiff’s functional capacity.

16 B. Paul D. Connor, Ph.D.

17 Plaintiff was given a neuropsychological assessment on January 17, 2008 by Paul D.
18 Connor, Ph.D. (AR 253-59), diagnosing cognitive and attention deficit disorders and related
19 learning disabilities. The ALJ gave some weight to Dr. Connor’s assessment that plaintiff
20 could be moderately limited in her ability to concentrate and follow detailed instructions.
21 However, the ALJ did not accept Dr. Connor’s recommendation of part-time rather than
22 full-time employment, assessing it as “an advocacy exercise in helping the claimant to get

benefits so she can spend time with her children and work on her education.” (AR 35.)

Plaintiff takes issue with the ALJ’s conclusion, but the Court finds it to be a permissible, reasonable inference from Dr. Connor’s report. Specifically, Dr. Connor wrote:

Employment in light manufacturing or assembly, like her placement at Orion Industries, would suit her well and help to minimize the impact of her physical and cognitive weaknesses. Virginia expressed her enjoyment volunteering at the Salvation Army. If a paying job became available to her in this setting, Virginia would likely be happy with that. She would likely need some ongoing job coaching for tasks required and to help her with the social aspects of the employment. Based on her limitations, it seems likely that full-time employment may not be the most appropriate for her. However, a part-time job that allowed her the time to spend with her children and to work on her education, should be most advantageous for her.

(AR 258.)

Reading Dr. Connor’s report in context, it was reasonable for the ALJ to infer that Dr. Connor suggested part-time work because it would be more personally “advantageous” for plaintiff to be able to spend time with her children and to work on her education, rather than because she lacked the capacity to work full-time. While the doctor may be correct that part-time work might be more desirable from plaintiff’s point of view, disability benefits are not awarded for these reasons. The Court finds no error in the ALJ’s consideration of Dr. Connor’s opinions.

C. Robert E. Parker, Ph.D.

Dr. Parker completed a psychological evaluation of plaintiff for the Washington State Department of Social and Health Services (DSHS) in September 2008. (AR 311-31.) While the ALJ accepted Dr. Connor’s diagnosis of certain cognitive disorders, he found “the variety of additional mental disorders indicated by DSHS examiners [to be] poorly supported by the

01 record” and by the neuropsychological assessments conducted by Dr. Connor. (AR 34.) The
02 ALJ noted that plaintiff had not been treated for depression or anxiety, and her primary care
03 provider (Dr. Christoferson) had neither reached any persistent diagnoses of such conditions,
04 nor made any referrals for specialized treatment in that regard. (*Id.*)

05 Plaintiff’s assignment of error with regard to the ALJ’s assessment of Dr. Parker’s
06 opinion misconstrues the ALJ’s reasoning. Contrary to plaintiff’s argument, the ALJ did not
07 reject Dr. Parker’s opinion because the plaintiff had not been referred by her primary care
08 provider. Rather, the ALJ found the diagnoses set forth in Dr. Parker’s evaluation report
09 unsupported by the record, citing the lack of treatment provided by either the primary care
10 physician or a specialist. The Court finds no error in the ALJ’s consideration of Dr. Parker’s
11 report.

12 Other Medical Opinions and Issues

13 A. Fibromyalgia

14 Plaintiff argues the ALJ failed to properly evaluate her fibromyalgia step two. She
15 characterizes as contradictory the ALJ’s initial finding that she has a step two severe
16 impairment of “mild fibromyalgia”, yet describes it as “not severe” because it does not reduce
17 her RFC beyond the limitations assessed because of other impairments. (AR 19-20).

18 The Court notes that a step two severity finding does not necessarily imply that an
19 impairment will be found to result in functional limitations sufficiently significant to affect the
20 ability of a claimant to perform work activities. “[T]he step two inquiry is a *de minimis*
21 screening device to dispose of groundless claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th
22 Cir. 1996) (citing *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987)). Therefore, “[a]n

01 impairment or combination of impairments can be found ‘not severe’ only if the evidence
02 establishes a slight abnormality that has ‘no more than a minimal effect on an individual’s
03 ability to work.’” *Id.* (quoting Social Security Ruling (SSR) 85-28).

04 An RFC assessment at step four, on the other hand, considers the most a claimant can do
05 considering her limitations or restrictions. 20 C.F.R. § 416.945(a); SSR 96-8p. A claimant’s
06 severe impairment may or may not affect his or her functional capacity to do work. One does
07 not necessarily establish the other. However, since the Court finds it necessary to remand
08 this matter on other grounds, the ALJ should address any ambiguity that may be present in the
09 discussion of the severity of plaintiff’s fibromyalgia at step two.

10 B. Dr. John Yuen

11 Dr. Yuen was plaintiff’s treating rheumatologist. He completed a RFC questionnaire,
12 assessing significant limitations. (AR 549-53.) The ALJ gave “little weight” to this
13 assessment, finding it “not consistent with other substantial evidence in the record,” as well as
14 being overly and uncritically reliant on plaintiff’s subjective report of symptoms and
15 limitations. (AR 32.) To some extent, Dr. Yuen’s opinions might be considered consistent
16 with those expressed in Dr. Christopherson’s physical evaluation. (AR 362-67.) Since the
17 ALJ’s consideration of this evaluation on remand could also affect the weight given by the ALJ
18 to Dr. Yuen’s opinions, the Court finds it premature to consider plaintiff’s arguments in this
19 regard.

20 C. RFC and Ability to Perform Past Relevant Work

21 Plaintiff’s assignment of error with regard to the ALJ’s evaluation of her RFC, and the
22 related issue of her ability to perform past relevant work follows from her contentions relating

01 to the ALJ's evaluation of the medical evidence. The Court eschews consideration of these
02 issues since the ALJ's re-consideration of the opinions of Dr. Christoferson and Dr. Yuen's
03 opinions on remand may also implicate these determinations.

04 D. Credibility

05 Likewise, the ALJ's consideration of plaintiff's credibility may be affected by the
06 re-consideration of the medical evidence on remand. While the ALJ cites a number of reasons,
07 such as motivational issues and reported activities as undermining plaintiff's claim of complete
08 disability, the ALJ also relies on the conclusion that the record was devoid of objective medical
09 evidence to support a conclusion that plaintiff is disabled. The ALJ should re-visit the
10 credibility analysis on remand after addressing the opinions of Dr. Christoferson and Dr. Yuen.

11 E. Waived Arguments

12 Plaintiff sets forth a number of issues without any accompanying argument or citation
13 of authority. Plaintiff alleges the ALJ miscalculated her "date last insured," and her SSI
14 application should be treated "as also being applications for Social Security disability benefits".
15 (Dkt. 14 at 1, n. 1) Plaintiff alleges the ALJ erred by failing to "properly identify and consider
16 the limitations caused by Ferguson's carpal tunnel syndrome, Cognitive Disorder, Dysthymic
17 Disorder and Anxiety Disorder." (*Id.*, at 4, n. 3.) The Court finds these issues waived. *See*
18 *generally Carmickle*, 533 F.3d at 1161 n.2 (declining to address issues not argued with any
19 specificity) (citing *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1164 (9th Cir.
20 2003) (the court "ordinarily will not consider matters on appeal that are not specifically and
21 distinctly argued in an appellant's opening brief").)

22 ///

01 Remedy

02 “The decision whether to remand for further proceedings or simply to award benefits is
03 within the discretion of this court.” *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir.1989).
04 Remand is proper where, as here, additional administrative proceedings could remedy the
05 defects in the decision. *See Salvador v. Sullivan*, 917 F.2d 13, 15 (9th Cir. 1990). The Court
06 finds remand to be the appropriate remedy in this case.

07 CONCLUSION

08 For the reasons set forth above, this matter should be REMANDED for further
09 proceedings.

10 DATED this 21st day of December, 2012.

11 
12 _____
13 Mary Alice Theiler
14 United States Magistrate Judge
15
16
17
18
19
20
21
22